Ohio Civil Rights Commission

Memo

To: Desmon Martin, Director of Enforcement and Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: September 6, 2012

Re: *Victor O. Buadu v. State of Ohio, Department of Taxation*
(COL) 71 (35183) 11162007 22A-2008-02425C
Complaint No. 08-EMP-COL-35183

Victor O. Buadu v. State of Ohio, Department of Taxation
(COL) 71 (35451) 02122008 22A-2008-02339C
Complaint No. 08-EMP-COL-35451

CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT

ALJ RECOMMENDS DISMISSAL ORDERS

Report issued: September 6, 2012

Report mailed: September 6, 2012

**** Objections due: October 1, 2012**

DMJ:tg

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
William W. Patmon III
Stephanie M. Mercado, Esq.
Tom Roberts
Rashmi N. Yajnik

G. Michael Payton, Executive Director

September 6, 2012

Victor O. Buadu
5364 Winchester Cathedral Drive
Canal Winchester, OH 43110-8337

Julie Dillon, Esq.
5364 Winchester Cathedral Drive
Canal Winchester, OH 43110-8337

Matthew Karam, Esq.
Joseph N. Rosenthal, Esq.
Assistant Attorneys General
Employment Law Section
State Office Tower, 23rd Floor
30 East Broad Street
Columbus, OH 43215-3414

Re: *Victor O. Buadu v. State of Ohio, Department of Taxation*
(COL) 71 (35183) 11162007 22A-2008-02425C Complaint No. 08-EMP-COL-35183

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty (20) days from the mailing date of this report.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **Monday, October 1, 2012**. *No extensions of time will be granted.*

Any objections received after this date will be **untimely filed** and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414**. *All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION

Desmon Martin / tg

Desmon Martin
Director of Enforcement and Compliance

DM:tg

Enclosure

cc: Lori A. Anthony, Chief – Civil Rights Section
Darlene Fawkes Pettit, Esq.
Denise M. Johnson, Chief Administrative Law Judge

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Re: *Victor O. Buadu v. State of Ohio, Department of Taxation*
(COL) 71 (35451) 02122008 22A-2008-02339C Complaint No. 08-EMP-COL-35451

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FOR THE COMMISSION

Desmon Martin / tg

Desmon Martin
Director of Enforcement and Compliance

DM:tg

Enclosure

cc: Lori A. Anthony, Chief – Civil Rights Section
Darlene Fawkes Pettit, Esq.
Denise M. Johnson, Chief Administrative Law Judge

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

VICTOR O. BUADU

Complainant

v.

STATE OF OHIO,
DEPARTMENT OF TAXATION

Respondent

Complaint No. 08-EMP-COL-35183
(COL) 71 (35183) 11162007
22A – 2008 – 02425C

Complaint No. 08-EMP-COL-35451
(COL) 71 (35451) 02122008
22A – 2008 – 02339C

CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

MIKE DeWINE
ATTORNEY GENERAL

Darlene Fawkes Pettit, Esq.
Assistant Attorney General
Civil Rights Section
State Office Tower, 15th Floor
30 East Broad Street
Columbus, OH 43215-3428
614 – 466 – 7900

Counsel for the Commission

MIKE DeWINE
ATTORNEY GENERAL

Matthew Karam, Esq.
Joseph N. Rosenthal, Esq.
Assistant Attorneys General
Employment Law Section
State Office Tower, 23rd Floor
30 East Broad Street
Columbus, OH 43215-3414
614 – 644 – 7257

Counsel for Respondent

Julie Dillon, Esq.
5364 Winchester Cathedral Drive
Canal Winchester, OH 43110

Counsel for Complainant

Victor O. Buadu
5364 Winchester Cathedral Drive
Canal Winchester, OH 43110-8337

Complainant

ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414
614 – 466 – 6684

INTRODUCTION AND PROCEDURAL HISTORY

Victor O. Buadu (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (the Commission) on November 16, 2007 and February 12, 2008, respectively.

The Commission investigated and found probable cause that unlawful discriminatory practices had been engaged in by the State of Ohio, Department of Taxation (Respondent) in violation of Revised Code Sections (R.C.) 4112.02(A) and (I).[1]

The Commission issued Complaint and Notice of Hearing No. 08-EMP-COL-35183 on October 2, 2008 and Complaint and Notice of Hearing No. 08-EMP-COL-35451 on December 11, 2008.

The Complaints alleged that Respondent failed to promote Complainant to Positions 1223 and 1147 because of his race, national origin, and participation in a protected activity, in violation of R.C. 4112.02(A) and (I).

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[1] The Commission did not prosecute Complaint No. 35451 (retaliation). (Tr. 9)

Respondent filed Answers to the Complaints admitting certain factual allegations, but denying that it engaged in any unlawful discriminatory or retaliatory practices. Respondent also pled affirmative defenses.

A public hearing was held on June 12, 2009 at the Ohio Civil Rights Commission, 5th Floor Conference Room, 30 East Broad Street, Columbus, Ohio.

The record consists of the previously described pleadings; the transcript, consisting of 257 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on May 5, 2010; by Complainant on May 26, 2010; by Respondent on May 26, 2010; and the Commission's reply brief, filed June 7, 2010.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed; each witness's strength of memory; frankness or the lack of frankness; and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed sworn charge affidavits with the Commission on November 16, 2007 and February 12, 2008, respectively.

2. The Commission determined it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A) and (I). The determinations were made on September 11, 2008 and November 13, 2008, respectively.

3. The Commission attempted to eliminate the alleged unlawful discriminatory practices by informal methods of conciliation. The Commission issued the Complaints after conciliation failed for each matter.

4. Respondent is a political subdivision of the State of Ohio and an employer.

5. Complainant is an African-American, who was born in Ghana.

6. Complainant lived in Ghana until 1995, when he came to the United States. (Tr. 128)

7. Complainant has an MBA from Howard University, a Master's in Accounting from Ohio State University, and is a Certified Public Accountant.

8. In November 2003, Complainant started working for Respondent as a Tax Commission Agent 1 (TCA 1) in the Taxpayer Services Division. Complainant continued to be a TCA 1 for about a year. (Tr. 134)

9. Then Complainant became a Tax Auditor Agent 1 (TAA 1) with the Excise and Motor Fuel Division for eleven (11) months. (Tr. 135)

10. In October 2006, Complainant became a TCA 4. (Tr. 136)

11. On August 30, 2007, a TCA Supervisor 1 position became available and Vacancy 1147 was posted. (Comm. Ex. 1)

12. Complainant applied for Vacancy 1147 on September 4, 2007. (Comm. Ex. 2)

13. Complainant met the minimum requirements listed for Vacancy 1147. Complainant had an MBA, as well as a Master's Degree in Accounting, when he applied for Vacancy 1147. (Tr. 141, Comm. Ex. 1)

14. Complainant was scheduled for a written interview.

15. For the past five (5) years, Respondent has primarily used structured written interviews of qualified applicants to fill its vacant positions. (Tr. 56)

16. When a vacancy arises, the person who will supervise the position typically drafts questions and a corresponding answer key for the written interviews, and then works with the Human Resources Division (H.R.) to make sure the questions and answers are relevant to the job duties. The questions and answers are based on the duties set forth in the position description. (Tr. 62, 64)

17. The draft questions are then reviewed by the administrator of the Division where the vacancy lies. That administrator makes necessary changes and submits them for final approval to Tim Stauffer (Stauffer), Respondent's Executive Administrator of Human Resources. (Tr. 56, 64)

18. The qualified candidates for Vacancy 1147 took a written examination that consisted of eight (8) questions. (Tr. 145-146)

19. Applicants were given 15 minutes to review the questions and then two (2) hours to answer the questions. (Tr. 145-146)

20. At the end of the examination for Vacancy 1147, Randy Dusenberry (Dusenberry) and two (2) other Supervisors, Dianna Sanato (Sanato) and Angela Hostettler (Hostettler), scored the interviews. (Tr. 21)

21. The applicants placed their names on their answer sheets. (Comm. Ex. 5)

22. Complainant scored a 132 out of a possible 345 points on the written interview. His score was the second highest of the twenty (20) applicants tested. (Comm. Ex. 7)

23. The position was given to the individual with the highest score, (222), John Paulson (Paulson), a Caucasian male. (Tr. 52, Comm. Ex. 7)

24. Out of the top five (5) scorers for Vacancy 1147, three (3) of them were African American. (Tr. 180-181, Resp. Ex. J)

25. There was no oral interview or second interview conducted for Vacancy 1147.

26. Complainant was told by Dusenberry that he was not chosen for Vacancy 1147. Dusenberry advised Complainant to answer the interview questions more thoroughly next time. (Tr. 36)

27. On November 28, 2007, another TCA Supervisor 1 position, listed as Vacancy 1223, became available in the Compliance Division. (Tr. 85, Comm. Ex. 9)

28. Complainant applied for Vacancy 1223 because he met the minimum qualifications listed on the vacancy posting and was again given a written interview. (Comm. Ex. 10)

29. Bradley Marshall (Marshall), a TCAS 2, who would be Vacancy 1223's direct report, prepared the interview questions for this vacancy. To prepare the interview, Marshall used past Compliance Division interview questions and the job posting's listed duties. (Tr. 73, 77, 86-87)

30. Marshall, Caucasian, reported to Rodney Richberg (Richberg), Tax Program Administrator 1 (TPA 1). (Tr. 85)

31. Richberg, who is African-American, administered the written interview for Vacancy 1223. He instructed the candidates at the beginning of the examination not to assume the interviewers knew anything about them and to "be as descriptive as possible with [their] answers." (Tr. 84, 88)

32. The candidates were asked to place their names on the answer sheets, per Respondent's policy. (Tr. 62)

33. After the candidates finished their eight-question interview, Marshall, Richberg and Kim Agler (Agler), a Caucasian Supervisor, graded the candidates' answers based on an answer key prepared by Marshall. (Tr. 88-89, 109)

34. For Vacancy 1223 Complainant received a score of 143 out of a possible 300 points. Complainant had the ninth highest score. (Comm. Ex. 17)

35. Vacancy 1223 was filled by Scott McClung (McClung), Caucasian male, who received the highest score (230) on the written interview. (Tr. 156, Comm. Ex. 18)

36. For Vacancy 1223, there was also no oral or second interview conducted. (Comm. Ex. 18)

37. Complainant received an e-mail which explained he was not chosen for Vacancy 1223. (Tr. 156)

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented.[2]

1. The Commission alleged in the Complaint that Respondent failed and refused to promote Complainant for reasons not applied equally to all persons without regard to their race and national origin.

2. These allegations, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

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[2] Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, ..., national origin, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone*, (1998), 82 Ohio St.3d 569. Thus, reliable, probative and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981). It is simply part of an evidentiary framework "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 254, 25 FEP Cases at 116, n.8.

6. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent's articulation of a legitimate, nondiscriminatory reason for its failure to promote Complainant removes any need to determine whether the Commission proved a *prima facie* case, and the "factual inquiry proceeds to a new level of specificity." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 31 FEP Cases 609, 611 (1983), quoting *Burdine, supra* at 255, 25 FEP Cases at 116.

> Where the defendant has done everything that would be required of him if the plaintiff has properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.
>
> *Aikens, supra* at 713, 31 FEP Cases at 611.

7. Respondent met its burden of production with the introduction of evidence that the position(s) were given to the individual(s) who scored the highest on the written interview and the candidates who took the written interview were all minimally qualified.

8. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for its failure to promote Complainant were not the true reasons, but were "a pretext for discrimination." *Id.*, at 515, 62 FEP Cases at 102, quoting *Burdine, supra* at 253, 25 FEP Cases at 115.

> [A] reason cannot be proved to be a "pretext for ... [unlawful retaliation]" unless it is shown *both* that the reason was false, *and* that ... [unlawful retaliation] was the real reason.
>
> *Hicks, supra* at 515, 62 FEP Cases at 102.

9. Thus, even if the Commission proves that Respondent's articulated reasons are false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the ... [Commission's] proffered reason of race is correct. That remains a question for the factfinder to answer ....
>
> *Id.*, at 524, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer that Complainant was, more likely than not, the victim of race discrimination.

10. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for its failure to promote Complainant. The Commission may directly challenge the credibility of Respondent's articulated

reasons by showing that they had no basis in fact or they were insufficient to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reason without additional evidence of unlawful discrimination.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination ... [n]o additional proof is required.[3]
>
> *Hicks, supra* at 511, 62 FEP Cases at 100 (emphasis added).

11. The Commission may indirectly challenge the credibility of Respondent's reasons by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reasons are a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove the reasons did not *actually* motivate the employment decision, requires the Commission produce additional evidence of unlawful

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[3] Even though rejection of a respondent's articulated reason is "enough at law to *sustain* finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* 511, 62 FEP Cases at 100, n.4.

discrimination besides evidence that is part of the *prima facie* case. *Id.*

12. The qualifications for each of the positions were not weighted based on educational achievement as being afforded the greatest weight by Respondent. The interview and selection process involved both objective and subjective criteria which were made known to all of the candidates.

13. Even if McClung, the highest scoring candidate, had not participated in the written interview for Vacancy 1223, Complainant, consequently, would not have received Vacancy 1223, as he was the ninth highest scorer. Respondent always chose the highest scoring candidate for the position, unless there were candidates with close scores and then a second interview would occur.

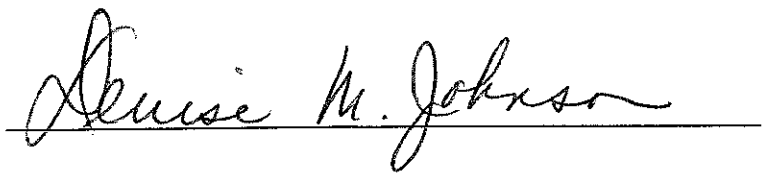
14. The candidates were provided the same written interview and were graded using the same answer key for that specific vacancy.

> [A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.
>
> *Combs v. Meadowcraft, Inc.*, 73 FEP Cases 232, 249 (11th Cir. 1997).

15. The Commission failed to establish that Respondent's articulated reasons for denying Complainant two (2) promotions were a pretext for illegal discriminatory conduct.

RECOMMENDATIONS

For all the foregoing reasons, it is recommended the Commission issued Dismissal Orders in Complaint No. 08-EMP-COL-35183 and Complaint No. 08-EMP-COL-35451.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

September 6, 2012